IN THE

Supreme Court of the United States

October Term, 1966
No. 3

ROBERT REDRUP, *Petitioner,*

vs.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

On Writ of Certiorari to the Appellate Term of the Supreme Court of New York, First Judicial Department.

No. 16

WILLIAM L. AUSTIN,

vs. *Petitioner,*

COMMONWEALTH OF KENTUCKY,
Respondent.

On Writ of Certiorari to the McCracken Circuit Court of McCracken County, Commonwealth of Kentucky.

Reply Brief of Amicus Curiae Citizens for Decent Literature Inc., an Ohio Corporation, in Support of Respondents.

I.

Counsel for petitioners is in error when he argues to this Court in his reply brief:[1]

[1]Petitioners' Reply to Briefs Amicus Curiae of Citizens for Decent Literature, Inc., an Ohio Corporation, in Support of Respondents, at page 2.

> "Since, however, the Citizens for Decent Literature, Inc., known commonly as 'CDL', has sought in its briefs to generate 'hydraulic pressures' by . . . *distortions of the governing law (Redrup Br. 24; Austin Br. 34-35; see, California Penal Code §311-(e); Stats. 1961, c. 2147, p. 4427, §(6), . . .:"* (our emphasis).

That which is claimed as a distortion (Redrup Br. p. 24; Austin Br. pp. 34-35) is an entirely correct statement of the "governing law" as it existed at the time of *Smith v. California,* 361 U.S. 147, 80 S. Ct. 215, 4 L. Ed. 2d 205 (Dec. 14, 1959), which was the matter under discussion in both briefs. It could hardly be otherwise, in view of the fact that the appellate precedent referred to, was the California appellate decision which was being reviewed by this Court in the *Smith* case in 1959. Counsel traps himself in his own argument (*supra*) which contains an admission that the California statute *he refers to* (section 311(e)) *was passed and adopted by the California Legislature in 1961, which was two years after the Smith case was decided.*

It is significant that counsel for petitioners has found no answer to the aforesaid arguments.

II.

Counsel for petitioners notes at page 17 of his reply brief:

> "In one of the sets of photographs attached to the CDL brief amicus in Redrup herein (see photographs, p. 7),[2] there is reference to the case

[2]More exactly, amicus made reference to six of the seven books named in the Houston indictments. See CDL's Brief Amicus Curiae in the *Redrup* case, photographs, pp. 6, 7.

> of 'U.S. v. Hamling et al. Houston, Texas Indictments, Sept. 11, 1965' .... It is important to note that after a six-week trial, the jury was unable to reach an agreement and a mistrial was declared, *a conclusion known to amicus but which is left unmentioned in its briefs.*' . . ." (our emphasis).

What petitioners' counsel states is true—this result was known to amicus, as it was to the entire nation and this Court through the wide press coverage given at the time the mistrial was announced on Friday September 2, 1966. What was not known to the general public or this Court, however, was the trial factors which played a dominant role in this peculiar result and the post trial statements attributed to District Judge Ingraham.[3]

Because such matters did not bear directly upon the argument as to which the information was offered, *i.e.*, that such paperbacks had a notorious reputation, a complete discussion was not felt necessary nor was it offered. At this time, however, amicus will reply briefly[4]

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[3]District Judge Ingraham's statement appears at page 19 in Petitioners' Reply Brief to CDL's Brief Amicus Curiae, as a part of the Houston Chronicle article of Sept. 5, 1966.

[4]A more complete discussion of the peculiar result in the *Houston* case appears in a amicus curiae brief filed in this Court concurrently with a motion under Rule 42.1 to appear as amicus curiae and to file a partial brief in support of the Respondent in *Aday et al. v. United States of America*, October Term 1966, No. 149. Although Mr. Fleishman, as counsel for petitioner *Aday et al.* points out in footnote 1 on page 3 of Petitioners' Reply to the Memorandum for the United States in the *Aday* case that Judge Ingraham announced his intention at the start of the trial to follow the law laid down by District Judge Fox in the *Grand Rapids Aday* trial, he does not tell this Court that such pattern was materially altered when the United States attorney at the conclusion of the trial asked that the test for obscenity given by Judge Fox be changed *to require proof as*

(This footnote is continued on the next page)

inasmuch as petitioners' counsel has used the result reached in the *Houston* case to support his argument that "one cannot tell a book from its cover."[5]

District Judge Ingraham's statements in Court at the time that the mistrial was declared were the comments of a trial judge who had not had the benefit of a full disclosure of the facts surrounding the publication of the books involved. He was not as knowledgeable as the typical book seller on Main Street, Los Angeles or 42nd Street, New York. He had not been informed that the same brand of books had been held to be hard

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to three separate elements (Houston Chronicle, Aug. 23, 1966, page 6, sec. 1), as advocated in the lead opinion of Justices Warren, Brennan and Fortas in the no-clear majority decision in *John Cleland's Memoirs of a Woman of Pleasure et al. v. Attorney General of the Commonwealth of Massachusetts*, ... U.S. ...., 16 L. Ed. 2d 1, 86 S. Ct. .... (Mar. 21, 1965). We contend that the three element test, while proper in an injunction action under certain circumstances, has no application in a criminal action and is redundant, misleading, and inaccurate. See National Decency Reporter Vol. III, No. 6, June-July 1966 "Analysis of the Mishkin, Ginzburg and Fanny Hill Decisions at page 16 "The Constitutional Criteria are not Applied Independently in Criminal Cases." If engrafted as a requirement on the *Roth* test, the same will create greater havoc than did this Court's development of restrictive rules in previous restraint cases during the period 1958-1965. See CDL Commentaries on the Law of Obscenity Vol. No. 3 pp. 1-4 *et seq.* and CDL's Brief Amicus Curiae in the *Fanny Hill* case at page 36. *How can a jury not be mislead when it is told that after it finds that the dominant theme of the material and the publisher's intent is an appeal to prurient interest and is substantially beyond customary limits of candor (patently offensive), it must also find that it is utterly without redeeming social value.* After nine days of deliberation and a mistrial, one juror told the Houston Post that he felt "the three tests for legal obscenity were drafted in an ambiguous manner purposely to prevent 12 people from being able to agree." Houston Post, Sept. 3, 1966. Having seen what such a test has done in the California jurisdiction and having examined the Houston materials we are in total agreement.

[5]Petitioners' Reply Brief to Briefs Amicus Curiae of CDL at page 17.

core pornography by the highest courts in New York and Kansas and to be obscene by the highest courts in Illinois and Georgia and by the Circuit Court of Appeals for the Second Circuit.[6] See CDL's Brief Amicus Curiae in *Redrup v. New York,* pages 30-31. Nor was he aware that seven of such books are presently before this Court awaiting review. See CDL's Brief Amicus Curiae in *Redrup v. New York,* photographs pages 1-2. Judge Ingraham ruled that there was insufficient evidence of pandering and refused to charge the jury on this issue. See Houston Chronicle article of September 4, 1966. Through no fault of his own Judge Ingraham was no better informed than District Judge Templar when he dismissed the federal indictments in *United States v.. Linetsky,* No. T-CR. 582

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[6]In a radio panel discussion, Mr. Fleishman, after having related to the radio audience the post trial statement of District Judge Ingraham, was asked by Counsel for CDL "Did any of these results which have been recently found throughout the United States with respect to the Nightstand, Midnight, Ember and Leisure Readers (the decisions referred to in CDL's Brief Amicus Curiae in the *Redrup* case at pp. 30, 31 and photographs pp. 1, 2), did these results get to the judge?" "Did he understand that there are 7 books before the United States Supreme Court which have been finally approved as obscene in other jurisdictions? Did he know of the results in Kansas? Did he know of the results in trial courts in other states? Mr. Fleishman replied." The United States of America had five lawyers representing the United States of America at the trial. One man from Washington who was the expert from the Department of Justice in this area and there were four local lawyers adequately energetically, conscientiously representing the interest of the United States of America and they tried the case which was the best case they knew how to try. All of the relevant information that they thought they could possibly bring before judge and jury was brought out. . . . I don't know if it got to the judge. It was not adduced as relevant evidence. . . ." We are only saying in this note that District Judge Ingraham's post trial statement was not based on the best information available, and should not be given weight in support of Petitioners' argument that you can't tell these books by their covers.

(D.C. Kans.) (June 24, 1965) and in *United States v. Wasserman* (D.C. Kans.) No. T-CR 581 (June 29, 1965). See CDL Amicus Curiae Brief in the *Fanny Hill* case at page 43 entitled "A Problem of Communication" and CDL Commentaries on the Law of Obscenity Vol. 3 pages 1-7 *et seq.*

Respectfully submitted,

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